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EXTRADITION.[1]

The great expansion in recent times of the system of extradition is an evidence of the gradual recognition by nations, in their intercourse with one another, of common sense as a controlling principle. Extradition imports, simply, the enforcement of the law. Formerly, each State seemed to endeavor so far as possible to defeat that end, by making itself a refuge for offenders against the laws of other States. Domestic criminals were prosecuted and punished. Foreign criminals were regarded as objects of peculiar favor, and were not given up except in the presence of superior force. What was called the right of asylum was carefully guarded.

In the last half century there has been a revolution in opinion on this subject. In place of the idea of asylum as a right belonging to the fugitive, there has been established the right of the State either to extradite or to expel any offender who comes within the jurisdiction. This right is recognized in the laws of all civilized States, and in none more fully than in those of the United States.

The change in opinion on the subject of extradition, though

[1] Read at the World's Congress of Jurisprudence and Law Reform, at Chicago, August 17, 1893.

it has been rapid, has been the result, and the necessary result, of modern developments. The present century has been characterized by a wonderful improvement in facilities of travel and by vast movements of population. And as flight from justice has become more easy and more frequent, the necessity to check it has become more apparent.

As the practice of surrendering fugitives from justice has been extended, the distrust which was formerly felt among nations in respect to the treatment which a surrendered criminal might receive has gradually disappeared. Even where treaties of extradition existed, the prejudice against them formerly was so great as to obstruct their execution. The treaty between France and Great Britain of February 13, 1843, never was executed, though it was little more than a rescript of Article 20 of the Treaty of Amiens, between France, Spain, Holland and Great Britain, signed March 2, 1802. In 1852 another convention of extradition was concluded between France and Great Britain, but it never went into effect. Between the years 1854 and 1858 France made seven demands under this treaty, but in no case was a warrant of extradition granted, and further demands were abandoned. At the present day there exists between the two countries a comprehensive treaty of extradition, under which fugitive criminals, including that new species of social and political reformer, called the anarchist, are fully delivered up.

The first extradition treaty of the United States was embodied in the 27th Article of the treaty with Great Britain of 1794, commonly called the Jay Treaty. It included only murder and forgery, and, being limited in duration to a period of twelve years from the date of the exchange of ratifications, expired in 1807. The surrender under its provisions of one Robbins, an alleged American citizen, on the order of President John Adams, created great popular excitement and materially contributed to the overthrow of his administration. The next extradition treaty of the United States may be found in the 9th Article of the convention with Great Britain of August 9, 1842, known as the Webster-Ashburton Treaty. It comprised only the offences of murder, assault with intent

to commit murder, piracy, arson, robbery, forgery, and the utterance of forged paper; but it awoke violent opposition in the United States, and on January 30, 1844, Mr. Benton offered in the Senate a resolution for its immediate termination. This resolution was not adopted. On July 15, 1889, there was concluded between the United States and Great Britain a comprehensive treaty of extradition, by which many offences were added to the list comprised in the treaty of 1842, and by which the relations between the United States and Great Britain, in respect to extradition, were made more satisfactory than those between the United States and any other power.

The question whether it is the duty of a nation to deliver up fugitives from justice in the absence of an express conventional obligation, has generally been answered in the negative, though publicists of great eminence have maintained that such a duty exists. In the case of Washburn,[1] in 1819, Chancellor Kent declared that it was "the law and usage of nations, resting on the plainest principles of justice and public utility, to deliver up offenders charged with felony and other high crimes, and fleeing from the country in which the crime was committed, into a foreign and friendly jurisdiction."

In his Commentaries[2] he is even more explicit. "It is declared," he says, "by some of the most distinguished public jurists that every State is bound to deny an asylum to criminals, and, upon application and due examination of the case, to surrender the fugitive to the foreign State where the crime was committed. The language of those authorities is clear and explicit, and the law and usage of nations, as declared by them, rest on the plainest principles of justice. It is the duty of the government to surrender up fugitives upon demand, after the civil magistrates shall have ascertained the existence of reasonable grounds for the charge, and sufficient to put the accused upon his trial."

But, assuming that a nation is not obliged, in the absence of a treaty, to deliver up fugitives from justice on demand, it by

[1] Johns. Ch. 105, 107.
[2] Vol. I., p. 37.

no means follows that governments are free from all obligation in such cases. "If," says Billot, "the State upon which the demand is made is not bound, in strict right, to authorize the extradition requested, it nevertheless is not free from all duty. The obligation rests upon it, which is incumbent upon every well-organized society, not to permit the moral law to be violated with impunity."[1] A nation which refused to surrender fugitives from justice and declined to enter into treaties on the subject, would become an object of general aversion, and would be the recipient of international complaints. Lord Campbell, once declared in the House of Lords that "he should like to see some general law enacted, and held binding on all States, that each should surrender to the demand of the other all persons charged with serious offences, except political."[2] In 1878 the Royal Commission appointed to consider the question of amending the British extradition acts, recommended that authority be conferred by act of Parliament upon the government to surrender fugitives from justice without reference to the treaties.

Several years ago an eminent Canadian judge expressed a desire, without regard to prejudices on economic questions, for "free trade" in criminals between Canada and the United States.[3] In 1889 the Parliament of Canada passed an act which provides for the surrender of fugitive criminals for any of a long list of crimes, without reference to the question whether a treaty exists with the demanding government, or whether, if a treaty does exist, the crime charged is included in it. The act, however, is not generally and immediately effective for purposes of extradition, since it is not to come into force with respect to fugitive offenders from any foreign State, until it shall have been declared by proclamation of the Governor-General to be in force and effect as regards such State, from and after a day to be named in the proclamation. This clause makes the execution of the act rest in the discretion of the Governor-General, and if he sees fit to require a promise

[1] Traité de l'extradition, p. 32.
[2] 60 Hansard, 325; Feb. 14, 1842.
[3] Mr. Justice Osler, *In re* Parker, 9 P. R. 332, 335.

of reciprocity as a condition of such execution, the act amounts to nothing more than a standing offer to conclude arrangements for the reciprocal surrender of persons charged with certain specified offences.

On December 13, 1875, Mr. Morrill, of Vermont, offered in the Senate of the United States, a resolution to instruct the Committee on Foreign Relations to "inquire into the expediency of providing, by general law, for the extradition of fugitives from justice upon the proper application and proof by the governments from whence they may have escaped, and also as to the propriety of refusing asylum to fugitive criminals, and removing them from the country." The resolution was considered by unanimous consent and agreed to, but the Committee failed to make any report.

It is, however, worthy of notice that the immigration laws of the United States require the return to the country from which they came, of all non-political convicts. Though this measure is not in the nature of an extradition treaty, the execution of which another government may require, its full significance, as affecting the subject of extradition, has, perhaps, hardly been appreciated. With such a provision in our statutes, it is difficult to set a limit to the extent to which the system of extradition may logically be carried. It is obvious that the mere fact of conviction does not render a man an undesirable immigrant, nor does successful flight from prosecution work a magical cure of evil propensities. The law is based on the principle that it does not comport with the safety of the State or of society in general to afford a refuge to criminals and shield them from punishment; and this is the basal principle of the system of extradition.

Not only has the number of extradition treaties been multiplied in recent times, but the scope of such treaties has been greatly extended by the incorporation of offences, which were formerly excluded. I refer especially to the inclusion of crimes of fraud. In this respect, nations have simply recognized the change, which, in the development of civilization, has taken place in the relative importance of criminal offences. As civilization develops and refinement of manners is culti-

vated, crimes of fraud take the place of crimes of violence. Embezzlement, swindling and breaches of trust take the place of robbery and larceny; and, for the very reason that they are committed secretly and without open breach of the peace, and may thus be continued for a long time without detection, they are more dangerous to social order and security than simpler crimes, which, though accompanied with violence, are more readily detected and more easily repressed. Every week brings us news of fraud by which the credit of public and private institutions is destroyed and ruin brought upon helpless investors; of swindling transactions by which innocent persons are reduced to poverty; and of breaches of trust by which the fortunes of many are dissipated. Such crimes are as dangerous as they are execrable, and call for the most relentless prosecution and repression.

There has been a general disposition on the part of the United States to include in extradition treaties crimes of violence and to exclude crimes of fraud; yet we find departures from this rule with so little apparent reason as to suggest that they are due to special and temporary causes rather than to a settled purpose to admit offences that fall in the latter category. Thus we find the offence of obtaining money or goods by false pretences only in the treaties with Spain and the Netherlands. This offence was included in the convention with Great Britain of July 12, 1889, but was stricken out by the Senate, although the offence of "receiving any money, valuable security or other property, knowing the same to have been embezzled, stolen or *fraudulently* obtained," was permitted to stand. One objection made to the insertion of the crime of obtaining money or goods by false pretences is that it is liable to abuse, and in order to prove the validity of the objection, resort is often had to cases that have occurred in the rendition of fugitives from justice as between the States of the United States. This argument is not well-founded, indeed is radically erroneous, for the reason that the methods of procedure in international cases are totally different from those employed as between the States. Our treaties and statutes provide for a judicial examination, in all international

cases, of the question of the fugitive's probable guilt, and it is provided that he shall be delivered up only on such evidence as would warrant his commitment for trial in the place where he may be found, if the offence had there been committed. If the judicial examination result in his commitment for surrender, the President may disregard the finding and refuse to make the delivery. In the interstate proceeding all these safeguards are lacking. There is, and legally can be, no examination into the question of the fugitive's guilt, either by the courts or by the State executives. The question is not whether there is sufficient evidence to lead one to believe that the fugitive committed the crime, but whether he is charged in the State from which he fled with having committed it. The existence of such a charge is the basis of the demand, and the duty to comply is immediate and absolute. It is, therefore, clear that an abuse of the process of interstate rendition, by making unfounded charges, affords no ground for supposing that an attempt to commit a similar abuse in an international case would be successful. The requirement and examination of the evidence of criminality, in the latter case, fundamentally distinguishes t from the former. The most effective stipulation in any of the treaties of the United States, touching crimes of fraud, is found in the convention with Great Britain of July 12, 1889, which includes among the extraditable crimes "fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the w of both countries."

In some of our treaties a limitation has been introduced, where the offence relates to the unlawful obtaining or taking of money or property, of requiring the object so taken to have been of a certain amount or value. I am compelled to think that such a limitation is from every point of view vicious and indefensible. The amount or value of property which a criminal may obtain is not determinative of the importance or gravity of his offence. This is shown by the fact that our statutes do not graduate penalties on any such basis. The law is not so sympathetic with the criminal as to commiserate and forgive him, because he may have been disappointed in

what he gained by his crime. The law does not say that a man may steal or embezzle any amount below fifty dollars, with impunity. Lawmakers know that it would be altogether absurd to make such a declaration. Yet, this is precisely what some of our extradition treaties have been made to say. In the Phelps-Rosebery treaty of June 25, 1886, which was rejected by the Senate in February, 1889, it was provided that embezzlement and larceny should be extraditable, when of property of the value of fifty dollars, or ten pounds, and upwards. In the treaty of July 15, 1889, that limitation was utterly discarded, the offences of larceny and embezzlement being included without any limitation whatever; nor was any pecuniary limitation, touching any offence involving the unlawful obtaining of property, admitted into the treaty. When the treaty was transmitted to the Senate, for its advice and consent to the exchange of ratifications, this aspect of the negotiation was prominently presented and fully explained. The treaty was approved without amendment in this regard. Yet, we find that the obnoxious limitation has been reintroduced in the recent treaty with Sweden.

The sensible view of the matter seems to be that, where an offence is of sufficient gravity to lead the contracting parties to make it extraditable, it should be left for the government within whose jurisdiction such offence has been committed to say whether in the particular instance an application for extradition should be made. Especially is this true in respect to offenders who have taken refuge in the United States. The expense and uncertainty of obtaining the extradition of such offences has always been so great, that a foreign government is not likely to take the risk of an application without good reason for so doing.

For many years it was a controverted question in the United States, and certainly an open question in England, whether a person extradited for one offence might be tried for another without having had an opportunity to return to the jurisdiction of the government by which he was surrendered. This question was answered in the negative by the British Extradition Act of 1870, and by the Supreme Court of the

United States in the case of William Rauscher in December, 1886.[1] For many years prior to the decision in this case, we had been inserting in our treaties a stipulation forbidding trial for other than the extradition offence. The question as to the right to try for another offence arose only under the treaties, particularly that with Great Britain of 1842, in which no rule was expressed; and the decision in the Rauscher case, which arose under that treaty, settled the law for all cases not governed by a special conventional provision.

From the rule that a person may not, without an opportunity to return to the jurisdiction from which he was surrendered, be tried for an offence other than that for which he was extradited, it does not necessarily follow that conviction and sentence must be for that crime and no other. Thus if the charge of crime for which the extradition was granted includes within itself another crime, there appears to be no reason why, upon a trial for the crime as charged, there may not be a conviction of the lesser crime which it includes. This exception would apply generally to those cases in which, by reason of the principal charge including an offence of a lower degree, an indictment is not held to be bad for duplicity. Such would be the case of an indictment for murder, in which the jury may disregard the higher charge and find a verdict of manslaughter; or for burglary and stealing, in which, in the failure of proof of breaking and entering, the jury may convict of larceny; or or assault and battery, or assault with intent to kill or ravish, or assault with intent to do other illegal acts, in which the defendant may be convicted of assault alone. But the trial must be for the extradition crime; and it is only in a case where, upon a trial for that crime, conviction may be had of another because included in it, that a conviction of any other than the extradition crime would be admissible.

But it is more than questionable, whether the rule against trial for any other than the extradition offence should be adhered to among nations. Arising out of the anxiety of governments to prevent perversion of the process of extradition, especially for the purpose of trying fugitives for

[1] *U. S.* v. *Rauscher*, 119 U. S. 407.

political offences, experience has shown that a rigid adherence to the rule often works a defeat of justice. The ways in which such a result may occur are many. Thus, A. is extradited on the charge of larceny of the goods of B. It turns out that the goods belonged to B. and C. A. is acquitted on the ground of variance between the indictment and the evidence. This exhausts the extradition process and the culprit is discharged. The same result might occur if A. were surrendered on the charge of stealing the goods of B., who turns out to be a married woman. Or, if A. is surrendered for larceny, and it is shown on the trial that he took an express package which had been placed in his hands to be delivered to his master. In accordance with the common-law principle, this would not be larceny, as the goods never were in the master's hands. Thus A. would go free. Likewise if, being a carrier, he appropriated goods in his care without breaking bulk. He is extradited for larceny and acquitted. He cannot be tried for embezzlement, though it is clearly proved. The same result would take place if, being surrendered for forgery, it should be shown that, as in the case of a clerk in a bank, with discretionary powers, his offence was only embezzlement. Other cases might be stated almost without end. The trouble and expense of extradition have been incurred and the culprit is discharged, though the very evidence that gives him his freedom establishes his criminality.

In view of these facts, it may well be argued that the strict rule against trial for other than the extradition offence should be modified, so that the ends of justice may be secured. In 1877 Dr. von Bar, of the University of Göttingen, the author of the leading German work on private international law, proposed, in an article in the *Revue de Droit International*, the following rules: (1.) That an extradited person may be prosecuted for a punishable act committed by him prior to his extradition, but not specified in the demand therefor, only if the government from which his extradition was obtained gives its consent expressly for the special case in question. (2.) That this consent should not be refused, unless the new punishable act constitutes a political offence, or a contravention of the

laws of customs or impost. Consent should otherwise be given, without regard to the degree of the penalty with which the act is punishable, or to the fact whether the offence is found in the number of those for which extradition may be demanded.[1]

Departures have been made from the rigid rule of restriction in four of the extradition treaties of the United States. The treaties with Spain and the Netherlands provide that the person extradited shall not be tried for any crime or offence other than that for which he was delivered up, unless such crime or offence be one of those specified in the treaty as affording ground for extradition. So far as the restriction of trial rests on the desire to shield the fugitive from political prosecutions, such a provision is insufficient. In this respect, it is less favorable to the fugitive than the rules proposed by Dr. von Bar, since it does not require the consent of the surrendering government. On the other hand, it is illiberal to the government whose laws have been violated in restricting the trial to a treaty crime. The other treaties of the United States containing special rules on this subject are those with Belgium and Luxemburg. By the Belgian treaty it is provided that, for crimes or offences committed previously to extradition, *and not enumerated in the convention*, the fugitive shall not be tried until he shall have been allowed a month to leave the country after having been discharged from custody on the extradition offence; but, for crimes or offenses committed previously to his extradition (other than that for which extradition was granted), *and enumerated in the convention*, it is provided, that he shall not be tried without the consent of the surrendering government. These provisions introduce the principle of consent, but as it is confined to offences enumerated in the convention, it is limitative of the rule as to trial for other than the extradition offence laid down in the Spanish and Netherlands treaties. Evidently modelled on the provisions of the treaty with Belgium are those in the treaty with Luxemburg, of 1883, the year following the conclusion of the Belgian treaty. The clauses, as to trial for offences not enumerated in the convention, are precisely the same; but, in respect to the

[1] Rev. de Droit Int. (1877), Vol. IX., pp. 5, 16.

enumerated offences, other than that for which extradition was granted, the Luxemburg treaty, instead of stipulating that the fugitive shall not be tried therefor without the consent of the government from whose jurisdiction he was taken, provides that he may be tried and punished for such offences, adding, however, that "notice of the purpose to so try him, with specification of the offence charged," shall be given to the surrendering government. These provisions appear to permit trial for another offence without the previous obtainment of the consent of that government, and the only restrictive provision, apart from that respecting notice to the surrendering government, is a stipulation that such government "may, if it think proper, require the production of one of the documents mentioned in Article 7" of the convention, which specifies the documentary evidences which must accompany requisitions for the surrender of fugitives charged with or convicted of the commission of crime.

For my own part, I accept the rules proposed by Dr. von Bar; but I would go a step further, and, besides permitting trial for another offence with the consent of the surrendering government, I would also permit it with the consent of the fugitive himself. It is true that the immunity of the extradited person grows out of his extradition, and, as a question of right, is international rather than personal. It rests upon a contract between the two governments, and not upon any agreement of either of them with the individual. His wishes are disregarded when he is seized and delivered up. It is to prevent him from gaining exemption from punishment by flight that he is surrendered. His immunity is within the control of the surrendering government, and he could not be permitted to set it up, if that government should waive it. But the immunity from trial, though within the control of the surrendering government, is, nevertheless, intended for the protection of the accused. That government reserves it, in order that it may not become a party to his oppression. It surrenders him to be tried for the extradition crime and no other, in order that its power over him may not be exercised to subject him to prosecutions, which it cannot recognize, and is unwilling to

promote. While, therefore, the immunity may be inferred from treaty, and by implication confirmed by domestic legislation, it is designed for the fugitive's protection; and unless he is by some clear provision forbidden to waive it, or the courts are in the same manner prohibited from accepting his waiver, it seems to be an extreme view to hold that he has not the right to forego his exemption. Such a course may be manifestly for his advantage. He may desire without delay to be tried on all the charges that are pending against him. To say that in such case he may not be tried is unnecessarily restrictive of his freedom. When within the jurisdiction of the surrendering government, prior to his extradition, it was within his power to return to the demanding State and stand trial for all his offences. To say that he cannot exercise the same right of election after his surrender, is to deny him the freedom of action he possessed before his extradition.

Nor is this view inconsistent with the doctrine that the courts of the demanding State possess jurisdiction to try the fugitive only for the offence for which he was surrendered. It is laid down as a general principle that where a court lacks jurisdiction, consent of parties cannot confer it. This principle, however, applies to the case where the defect in the jurisdiction of the court is inherent. In the case we are discussing, the jurisdiction of the court over the subject-matter is conceded. The court is unable to proceed only because the defendant is not within the jurisdiction. But if he voluntarily comes within the jurisdiction, if he submits himself by his own action to the process of the court, its jurisdiction is complete. The disability of the court is casual, not fundamental. Moreover, the principle that the fugitive may waive his immunity has received the broadest and most general recognition in the definition by courts and publicists of the rule respecting the limitation as to trial. That rule, as stated by Mr. Justice Miller in the case of Rauscher, is, "that a person who has been brought within the jurisdiction of the court by virtue of proceeding under an extradition treaty, can only be tried . . . for the offence with which he is charged, in the proceedings for his extradition, until a reason-

able time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he has been forcibly taken under those proceedings." What is the basis of the right to try, after such "time and opportunity" have been given? Nothing else than the waiver by the accused of his immunity. By refusing or neglecting to return, it is inferred that he has waived his immunity and consented to be tried.

Since the system of extradition has found favor, not in spite of the evils with which it was supposed to be identified, but because experience has shown that they do not exist, it may reasonably be anticipated that many of the restrictions which now bear on the operation of the system will ere long disappear before more rational views. It is greatly to be desired that governments, while extending their conventional relations on the subject, should each provide by law for the surrender of criminals without reference to treaty obligations. The theory that there must be an exact equivalence in the exchange of criminals, as if they were valuable commodities, was tolerable in the days when flight from justice was neither so easy nor so frequent as at present, and crime did not so often disclose the aspect of an international profession. But that theory should now yield to the higher and more sensible principle that it is neither the right nor the interest of any nation to obstruct the administration of justice.

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